Nos. 04-277 and 04-281

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IN THE

Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, ET AL.,
Petitioners,

—v.—

BRAND X INTERNET SERVICES, ET AL.,
Respondents.

(*Caption continued on inside cover*)

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION AND THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW IN SUPPORT OF RESPONDENTS

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THE UNITED STATES OF AMERICA,

Petitioners,

—v.—

BRAND X INTERNET SERVICES, ET AL.,

Respondents.

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INTEREST OF AMICI[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 400,000 members dedicated to the constitutional principles of liberty and equality. The ACLU has been at the forefront in numerous state and federal cases involving freedom of expression on the Internet, including *Reno v. ACLU,* 521 U.S. 844 (1997), and *Ashcroft v. ACLU,* ___ U.S. ___, 124 S.Ct. 2783 (2004).The ACLU believes that cable Internet access should be subject to common carriage requirements, affording open access. The ACLU is interested in ensuring non-discriminatory access to preserve and promote the Internet as an open, content neutral forum for free expression.

The Brennan Center for Justice at NYU School of Law, founded in 1995, unites thinkers and advocates in pursuit of a vision of inclusive and effective democracy. The Center's Free Expression Policy Project engages in research, advocacy, and litigation in the fields of media democracy, intellectual property, and other issues affecting the diversity and breadth of expression available to Americans. Like the ACLU, the Brennan Center believes that it is vitally important to ensure non-discriminatory access to the Internet as a forum for free expression.

STATEMENT OF THE CASE

This case is about the legal impropriety of the Federal Communications Commission's (FCC) classification of cable broadband as an information service. In 1996, Congress updated United States communication law with the passage of the Telecommunications Act. Pub. L. 104-104, 110 Stat.56. "[T]he statute maintained significant common carrier obligations on

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[1] Consent has been lodged with the Court pursuant to Sup. Ct. R. 37(3)(a). No counsel for a party in this case authored this brief in whole or in part, and no person or entity other than the *amici* or their counsel made a monetary contribution to the preparation and submission of this brief. Sup. Ct. R. 37(6).

providers of 'telecommunications services' but left providers of 'information services' subject to much less stringent regulation." *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003). Under this statutory framework, the manner in which a communications service is characterized becomes extremely important because the regulatory consequences vary significantly depending on that classification.

Following the Act, a number of federal courts were asked to address the question of how cable service should be classified, frequently in the context of determining whether a local franchising authority could condition a cable franchise on non-discriminatory access to the cable pipeline. For example, in *AT&T Corp. v. City of Portland*, 216 F.3d 871, 880 (9th Cir. 2000), the Ninth Circuit ruled that "the transmission of Internet service to subscribers over cable broadband facilities is a telecommunications service under the Communications Act," and thus could not be regulated as a cable service by a local franchising authority. In *MediaOne Group, Inc. v. County of Henrico, Virginia*, 257 F.3d 356, 365 (4th Cir. 2001), the Fourth Circuit agreed that the Communications Act pre-empted local regulation of cable broadcast services without ultimately deciding whether cable broadband is properly characterized as a telecommunications service or an information service.

In the midst of this judicial activity, the FCC issued a notice of inquiry in September 2000, announcing its intention to determine whether and how to regulate cable broadband service. Federal Communications Commission, *In the Matter of Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 15 F.C.C.R. 19287 (2000).

On March 15, 2002, the FCC issued a Declaratory Ruling and a notice of proposed rulemaking in which it concluded that cable modem service is properly classified as an information service and that there is no separate offering of telecommunications service. Federal Communications Commision, *In the Matter of Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 F.C.C.R. 4798, 4802 (2002). If upheld, this decision means that cable broadband providers would only be subject to regulation, if at all, under the

less stringent provisions applicable to information services and not under the more comprehensive regulatory scheme that applies to common carriers. In effect, the Commission leaves itself without authority to impose any meaningful regulation to protect the public interest.

Multiple petitions for review of the Commission's ruling were filed in the Third, Ninth, and District of Columbia Circuits. On April 1, 2002, the Judicial Panel on Multi-district Litigation transferred the related petitions for review to the Ninth Circuit for consolidation.

The Ninth Circuit decided that its precedent in *City of Portland* controlled, overruled the FCC's categorization, and remanded to the FCC for regulatory proceedings consistent with the court's prior holding that, "to the extent [a cable operator] provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act." *Brand X*, 345 F.3d at 1129, quoting *City of Portland*, 216 F.3d at 878. This Court then granted *certiorari*.

SUMMARY OF ARGUMENT

The FCC's classification of cable broadband as purely an "information service" violated its legal mandate. The Telecommunications Act's definition of "telecommunications service" unambiguously includes a service that enables customers to send information of their choice to the recipients of their choice. Whether Internet users choose to send e-mails, to upload video or audio files, or even to use the Internet as a telephone or videoconferencing infrastructure, the cable broadband service they rely on is a telecommunications service, indistinguishable except in technology from regular telephone service.

Moreover, the FCC violated the law by failing to satisfy its statutory duty to consider the public interest, particularly citizens' free speech and privacy interests, as Congress specifically mandated that it do. The 1996 Telecommunications

Act requires the FCC to act in the public interest and this Court has repeatedly recognized the importance of First Amendment principles in regulating communications services. While private actions by cable broadband providers do not directly implicate the First Amendment, the statute does require the FCC to consider the effects its regulations will have on free speech. The FCC improperly avoided making this inquiry, as Congress intended, by failing to recognize that cable broadband service includes a telecommunications service component.

Virtually all regions of the United States have only one cable company as the sole provider of the physical wires that form the basis of cable broadband services. Without regulations treating cable modem service as a common carrier telecommunications service, cable companies can leverage ownership of the physical infrastructure into control of citizens' access to and use of the Internet.

This threatens free speech and privacy. A cable company that has complete control over its customers' access to the Internet could censor their ability to speak, block their access to disfavored information services, monitor their online activity, and subtly manipulate the information sources they rely on. Customers may have no choice but to submit to this surveillance. While dial-up access to the Internet was once a viable alternative, the superior data transmission rates of cable broadband will increasingly dominate the market. Other theoretical alternatives either have serious practical drawbacks or are years away from availability. When telephone service became significant, the decision to regulate the service as a common carrier protected the free speech and privacy rights of the people. As the Internet becomes even more important as a voice of the people and a vital free forum for information, preserving free speech and privacy requires content-neutral common-carrier regulation for the cable broadband companies who are the vital pipeline between consumers and the Internet. The FCC's failure to consider the public interest in free speech and privacy, as intended by Congress, renders its regulations arbitrary and capricious.

ARGUMENT

I. THE FCC IS OBLIGATED TO PROMOTE FREE SPEECH AND PRIVACY WHEN CLASSIFYING AND REGULATING CABLE INTERNET SERVICE

In the 1996 Telecommunications Act, Congress specifically charged the FCC with acting in the public interest when regulating cable broadband. The Act requires the FCC "to promote the policies and purposes of this chapter favoring ... vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity." 47 U.S.C. § 257(b) (2000).

This Court has recognized that the FCC's conception of the public interest "invites reference to First Amendment principles." *Columbia Broadcasting System, Inc. v. Democratic National Comm.*, 412 U.S. 94, 122 (1973). One of those core principles is that the public interest is better served by more speech than by less. Thus the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public...." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). An unbroken line of precedents has reinforced the importance of a national communications policy that enhances, rather than restricts, the diversity of information sources. *Columbia Broadcasting System, Inc. v. FCC*, 453 U.S. 367, 395-96 (1981); *Federal Communications Commission v. National Citizens' Comm. For Broadcasting*, 436 U.S. 775, 794-97 (1978); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *National Broadcasting Co. v. United States*, 319 U.S. 190, 216-17 (1943). *Cf Federal Communications Commission v. League of Women Voters*, 468 U.S. 364, 377-81 (1984) (reaffirming FCC's

power to regulate in order to expand diversity and availability of expression, but not to suppress it).

That principle, of course, was first developed in a traditional communications universe, where the public interest could be adequately served by ensuring that listeners received a variety of viewpoints. Those public free speech interests are greatly magnified on the Internet, where listeners or viewers are also speakers and creators who themselves communicate over the Internet pipeline. *See ACLU v. Reno*, 929 F.Supp 824, 843-44 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997) ("Because of the different forms of Internet communication, a user of the Internet may speak or listen interchangeably, blurring the distinction between "speakers" and "listeners" on the Internet....").

Below, we illustrate how broadband providers with significant market power can control how citizens communicate over the Internet, often without their knowledge. Integrated control of both the pipeline and the communications that flow over it converts the cable company into a gatekeeper to the Internet, with the power to control and monitor its subscribers. When the FCC gave cable modem service providers the ability to prevent users from choosing what Internet service provider (ISP) they use, and thereby what information they can disseminate or to receive over the Internet, the FCC ignored the fundamental public interest in promoting more speech.

In crafting the 1996 Telecommunications Act, Congress recognized that regulation of telecommunications services as common carriers was presumptively in the public interest, but might not always be so. It therefore stipulated that the FCC might decline to exercise its regulatory authority over telecommunications services if its determined, after an appropriate hearing, that regulation is unnecessary to prevent discrimination and protect consumers and forbearance is "consistent with the public interest." 47 U.S.C. § 160(a).

The FCC did not follow that statutorily required path. No forbearance proceeding occurred because the FCC refused to acknowledge that the telecommunications component of broadband service must be regulated as a telecommunications

service. *Amici* agree that the FCC has no role in regulating the constitutionally protected content delivered by ISPs. Indeed, any attempt to do so would almost certainly violate the First Amendment. But that constitutional truism does not justify the FCC's unwillingness to acknowledge that cable broadband service performs a dual function. As explained more fully in the following sections, it provides both the pipeline and the information that travels over that pipeline. These separate functions require a separate legal and factual analysis. Instead, the FCC treated them as one. Beginning with a faulty premise, the FCC unsurprisingly reached an unsupportable conclusion.

An administrative agency is owed no judicial deference if its decision is reached in an arbitrary and capricious manner, or, "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D) (2000). "Normally, an agency rule would be arbitrary and capricious if the agency relied on factors which Congress has not intended it to consider, [or] entirely failed to consider an important aspect of the problem...." *Motor Vehicle Manufacturers Assn. of U.S., Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983). The FCC mischaracterized the nature of cable broadband service and failed to conduct a regulatory forbearance proceeding required by law. As a result, it did not give the necessary consideration to the critical matter of the public's free speech and privacy interests, in the manner that Congress intended. This Court should not allow the FCC to conceal its procedural failings with an act of definitional legerdemain.

Had the FCC correctly defined cable broadband to include a telecommunications service as well as an information service, and then properly considered the public's interest in free speech facilitated by a broad array of choices for broadband Internet service, we believe the evidence would have compelled the FCC to find that non-discrimination is in the public interest. 47 U.S.C. §§ 201-202.

II. THE FCC RULING ALLOWS CABLE PROVIDERS TO LEVERAGE MARKET DOMINANCE OVER THE PROVISION OF AN INTERNET PIPELINE INTO CONTROL OF THE MARKET FOR INTERNET SERVICES

Providers of cable lines possess tremendous market power over the provision of high-bandwidth pipelines to households, thanks to a nearly complete monopoly over cable lines to the home. Until 1992, the law permitted localities to award exclusive cable franchises, and many did. *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No 102-385 §7, 106 Stat. 1460, 1483 (banning exclusive franchises). Today's large cable companies owe their dominance in the market to the earlier government-granted monopoly. The first cable company to lay cable lines in an area is unlikely to encounter a subsequent competitor for the provision of cable lines. It is expensive to build a network of cable access lines, and there is little economic incentive to build a second network in parallel with a preexisting pipeline. An "overbuilder" seeking to compete for the same pool of subscribers must duplicate the efforts of the incumbent, building redundant lines and arranging for redundant connections to households. The extra cable lines must either be strung from pole to pole or buried underground, an expensive process that costs several hundred dollars per home served. *See* Dorothy Pomerantz, *If You Overbuild It*, Forbes (Apr. 16, 2001), *available at* http://www.forbes.com/forbes/2001/0416/144.html (last visited Feb. 15, 2005). The reward for this substantial investment is entry into a market where the overbuilder does not enjoy monopoly control. Instead, it must compete with an already entrenched provider that could use its pre-established market power to drive the overbuilder out. *See* Federal Communications Commission, *Eighth Annual Report on Competition in Video Markets* 83 (2002), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-01-389A1.pdf (last visited Feb. 15, 2005) ("Commenters report that...particularly where a new entrant may appear vulnerable for financial or other reasons, the initial response of a large incumbent...may be motivated by anticompetitive animus rather than legitimate business concerns."); *Id.* at 81-82 (describing allegedly predatory rate cuts by incumbent).

Compared to the prospect of being the only provider of cable lines, the economic incentive to build a competitive system is extremely weak.

The expected result – that cable providers will not build out to compete with each other – is borne out in the data. In 2004, the FCC noted that only 305 of the nation's 33,760 cable community units – less than one percent – had been found to enjoy "effective competition" among wireline providers. Federal Communications Commission, *Eleventh Annual Report on Competition in Video Markets* 74 (2005), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-13A1.pdf (last visited Feb. 13, 2005).[2] For the vast majority of Americans, there is no freedom to choose which cable line to use. Their choice is to either hook up to the sole provider or disconnect from cable modem service entirely.

Originally, market control over the provision of cable lines only gave companies practical control over the delivery of cable TV. Today, though, advancing technology has radically changed the nature of the services provided over this pipeline. *See* Columbia Telecommunications Corp., *Technological Analysis of Open Access and Cable Television Systems* 11 (2001), *available at* http://www.aclu.org/Privacy/Privacy.cfm?ID=13627&c=252 [hereinafter *CTC Analysis*]. Users can now access the Internet over cable lines, allowing them to send as well as receive information at extremely fast speeds. *Id.* at 12. Controlling the cable pipeline means that, in the absence of regulation, cable companies also can control the provision of services that allow citizens to access the Internet.

But just as cable television access and network television are different services, the provision of broadband access to the Internet (thepipeline) and the provision of Internet services are two separate services. *See* Columbia Telecommunications Corp., *Technological Analysis of Open Access and Cable Television Systems* 2 (2005 supplement), *available at* http://www.aclu.org

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[2] The FCC found effective competition in a total of 1,241 units, but in 936 of those, the competition came from satellite providers that had attained a 15% market share. *Id* at 74 n. 627.

/Privacy/Privacy.cfm?ID=17507 [hereinafter *CTC Supplement*]. The conceptual difference between pipeline provision and information service provision is simple but significant. As pipeline providers, cable companies maintain their cable installations and provide a conduit – a 'pipe' that carries data to and from customers. Exactly *what* data are carried is immaterial to the physical pipeline; they could be video images, voice communication, text, or any combination of all of the above. *See id.* The information could be headed to any destination or coming from any source on the Internet. Those details are handled by Internet routers, machines along the way that decide which road the data should travel next. *See* Cisco Systems, *Routing Basics*, *available at* http://www.cisco.com/univercd/cc/td/doc/cisintwk/ito_doc/routing.htm (last visited Feb. 15, 2005). Regardless of how or what information is ultimately communicated to the human users at the ends of the cable network pipe, inside the pipe it all takes the same form: a digital stream of ones and zeroes. The pipe's job is merely to carry those bits quickly and reliably from one end to the other.

The cable pipeline is therefore a neutral transport mechanism for whatever information the users ask it to send; it *carries* data rather than *providing* it. Congress has supplied a name for this sort of operation, which "transmit[s], between or among points specified by the user...information of the user's choosing, without change in the form or content of the information as sent and received"; it is called a "telecommunications service." 47 U.S.C. §§ 153(43), 153(46).

ISPs, on the other hand, structure and frame the ways in which people experience and use the Internet. ISPs can control the information users are able to send and receive. An ISP can choose to provide email, webhosting, video or other services. *See, e.g.*, Road Runner, *High Speed Online – Features*, *at* http://content.rr.com/rdrun/feat.htm (last visited Feb. 15, 2005). It can filter out material it deems inappropriate for children. *See, e.g.*, America Online, *About Parental Controls*, *at* http://www.aol.com/info/parentcontrol.html (last visited Feb. 15, 2005). It can provide users with a start page that brings certain information to one's attention. *See, e.g.*, *Welcome to EarthLink*, *at*

http://start.earthlink.net/ (last visited Feb. 15, 2005). It can, if it wishes, slow or block access to disfavored information for any reason. Metaphorically, the cable wire or pipeline is like a highway, and the Internet service is like a company that owns the trucks that drive on the highway. Cable companies may own the road, but that doesn't mean they also must own the trucks. Yet, this is the conflation made by the FCC in ruling that cable modem service is an information service alone, and not also a telecommunications service.

As a result of this conflation, the owners of the pipeline will be permitted to control access to the Internet road. Not only will they be allowed to charge whatever toll they want, they will be able to discriminate against other ISPs, effectively refusing to allow FedEx trucks on a UPS-only road. Consumers who wish to connect to the Internet via cable broadband are forced to choose from whatever ISPs the local cable provider chooses to make available, even if there is only one.

Limited choice is not a necessary part of the design. Different ISPs could reach their customers over separate frequencies on the same pipeline, just as analog cable channels occupy separate parts of the band on the cable. *See CTC Analysis* 23-25. Consumers could change their Internet service provider literally by changing the channel, without any need to make changes in their physical cable connection. Alternatively, different ISPs could share the same frequency range, and a router at the cable company's facility could dispatch traffic to each customer's ISP of choice. *Id.* at 25-32. Under this scheme, the number of ISPs sharing the pipe is limited only by the capacity of the router, not by any intrinsic constraint on the pipe itself. *Id.* at 26. The ability to add additional ISPs virtually at will differs greatly from the technical constraints on "must-carry" provisions for cable TV, where each channel added to the lineup means one that must be eliminated. *See Turner Broadcasting System v. FCC*, 512 U.S. 622, 674 (1994) (O'Connor, J., dissenting). Either a multichannel or shared pipe approach would enable multiple information service providers to share the same cable line, facilitating competition.

The FCC itself acknowledged both the wisdom and feasibility of mandated non-discriminatory access when it approved the merger of Time Warner and America Online. Federal Communications Commission, *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee* 22-23 16 F.C.C.R. 6547 (2001) [hereinafter *Time Warner Application*]. But today, in the absence of regulation, cable broadband companies are engineering their pipelines to prevent access by competing ISPs in the future. These operators are implementing a standard for cable modem communication, DOCSIS, that forecloses the capability to connect Internet users to multiple ISPs. *CTC Supplement* at 57-58.

The forced bundling of the means of transmission (pipeline) with Internet services (email, web browsing, etc.) is unprecedented in the history of the Internet. The dial-up services that citizens commonly used to access the Internet in its early days allowed people to select whichever ISP they wanted on equal, nondiscriminatory terms. Users could change the ISP they connect to merely by changing the phone number they dialed. Because the FCC and state governments regulated telephone providers as common carriers, the phone companies could not leverage their control over dialup lines into one over Internet service or ISPs. *See* Lawrence Lessig, *The Future of Ideas* 148 (2001)("Phone companies...did not play these games, because they were not allowed to."). As a result, thousands of ISPs, empowered to connect to their subscribers over regulated phone lines, sprang up to fulfill the public demand for various flavors of Internet access. *See* Shane Greenstein, *Building and Delivering the Virtual World: Commercializing Services for Internet Access*, 68 J. Indus. Econ. 391, 392 (2000), *available* at http://www.kellogg.northwestern.edu/faculty/greenstein/images/articles.html (last visited Feb. 15, 2005).

If cable companies need not make their lines available to competing ISPs, they need fear no equals – or superiors – in the new market for cable broadband Internet. In the AOL/Time Warner merger, the FCC found that the new merged entity's

dominant market power "would frustrate statutory goals and Commission policies designed to ensure that the American public has access to a diversity of information sources...." *Time Warner Application* at 22. Imposing a requirement of non-discriminatory access would ensure that "[m]arket forces, not control of a bottleneck facility, would determine the firms that would succeed in the relevant market, thereby enhancing efficiency and consumer welfare." *Id.* at 42. Consistent with these determinations, the FCC imposed a number of open-access requirements on Time Warner's cable Internet service. *Id.* at 54-57.

Most importantly, when customers have a choice of ISPs, they have a choice of what and how to communicate over the Internet. If an ISP discourages or stifles their communications, the citizen can simply change ISPs. If the ISP tracks how the citizen uses the Internet for the purpose of marketing or targeted advertising, for example recording what webpages she visits or books she purchases online, then the customer can simply change ISPs.

III. CABLE BROADBAND IS THE ONLY INTERNET SERVICE OPTION FOR MANY CITIZENS

For many consumers, cable broadband is the only feasible choice for accessing the Internet.

Dialup access, also called narrowband, is no longer a realistic option for an increasing number of Internet users. Phone lines supplied the first generation of consumer Internet access. Users connected to the Internet by placing telephone calls to computers at an ISP. In order to send digital information over the phone line, they used modems (modulator-demodulators) that translate data into hissing and beeping noises that can be sent over telephone lines designed to carry only sound. The resulting connections were capable of transmitting a few tens of thousands of bits – binary digits, either zero or one – per second. *See* Microsoft Corp., *Windows XP Professional Product*

Documentation: Modem Overview, *available at* http://www.microsoft.com/resources/documentation/windows/xp/all/proddocs/en-us/sag_modeconcepts_001.mspx (last visited Feb. 15, 2005).

By comparison, cable modems are capable of speeds dozens or even hundreds of times faster – millions of bits per second. *See Road Runner High Speed Online*, *at* http://www.timewarnercable.com/corporate/products/highspeedinternet/ (last visited Feb. 15, 2005) (advertising speeds "70 times faster than dial-up"); Cox Communications, *Fairfax Rates*, *at* http://www.cox.com/Fairfax/Rates.asp (last visited Feb. 15, 2005) (135 times faster). Many Internet applications can still be used over slow dialup links – electronic mail, instant messaging, browsing basic Web pages – but many modern Internet innovations require the ability to send and receive data at much faster rates than are possible with dialup. *See, e.g.*, Apple Computer, *iChat AV*, *at* http://www.apple.com/ichat/ (last visited Feb. 15, 2005) ("personal videoconference over any broadband connection"); Microsoft Corp., *About Xbox Live*, *at* http://www.xbox.com/en-US/Live/about/default.htm (last visited Feb. 15, 2005) (online gaming arena requires "[h]igh-speed Internet service"). While some applications still function over narrowband, they work much faster over broadband. As applications like Internet telephony, videoconferencing, audio streaming, and graphics-intensive web pages grow more prevalent and compelling, dialup is simply an unacceptable alternative to broadband access.

Other broadband alternatives exist, but are generally technically inferior to cable or are not available to many consumers. The second choice in broadband today is digital subscriber line (DSL), which uses special equipment to carry data over telephone lines at higher speeds than conventional modems. DSL's weakness is its sensitivity to line conditions; there can be no more than about 18,000 feet of copper wire between the phone company's central office and the subscriber, and aging wire or other impediments along the way can reduce the effective distance or even make the line completely unusable for DSL. *CTC Supplement* at 8-9. Especially for geographically widespread users

like those in rural areas, DSL availability is therefore an iffy proposition. Where it is available, it generally provides slower speeds – "a competing network…of roads, not superhighways." *Id.* at 2.

To the extent that DSL is available as a competitor service to cable, there nonetheless tends to be a duopoly in which each provider retains significant market power. The FCC has found that, "typical broadband internet market is very highly concentrated." In 2002, 65% of residential and small business broadband connections were cable and 31% were DSL. Only three percent of these connections used any other technology. Federal Communications Commission, *In the Matter of Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access*, 18 FCC Rcd 6722, 6775 (2003).[3]

More exotic broadband possibilities include powerline service, where signals are carried over electrical transmission lines, satellite Internet, long-range wireless, and fiber optics strung directly to the home. Powerline broadband is still in the early development and trial phase, and there is some concern that it may cause radio signal interference. *See* Barry C. West, Federal Emergency Management Agency, *Comments of the Federal Emergency Management Agency on Broadband over Power Lines Implementation*, *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6515582317 (last visited Feb. 10, 2005); *CTC Supplement* at 13-19 (noting technical concerns and describing the small number of trials underway). Satellite is significantly more expensive, both per month and in the up-front costs of purchasing, installing, and pointing a dish. *CTC Supplement* at 47-48. Due to the long distance the signal must travel to a satellite in geosynchronous orbit, the service suffers from signal delay that renders many real-time applications unusable or at best extremely annoying to users. *Id.* at 43-44. Terrestrial wireless service as a primary means of

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[3] *Amici's* argument that a regulatory scheme that promotes single ISP market dominance threatens speech and privacy extends to DSL broadband providers who exercise such market power as well. Because the case at hand deals with the classification of cable broadband, we focus on that here.

Internet access is still in development and will necessarily run up against the limited capacity of the over-the-air wireless spectrum. *Id.* at 2-3. Optical fiber run straight into the home has tremendous promise; "theoretically [it has] almost unlimited capacity." *Id.* at 33. At present, it costs thousands of dollars per fiber drop, and has only been deployed to a few thousand homes. *Id.* The future of fiber as a technology is bright, but its future as a marketed service is murky and unclear. *Id.* at 3.

Given the limited availability and performance of alternatives, people are frequently locked into cable as their only viable choice for Internet access. The fact that Internet users have only one good choice, cable, for the type of access they buy, coupled with the fact that cable companies can force their customers to use the selected or affiliated ISP means that unregulated cable companies will be powerful gatekeepers to the Internet.

IV. CABLE COMPANIES, AS INTERNET GATEKEEPERS, CAN CONTROL THE FLOW OF INFORMATION AND THREATEN FREE SPEECH AND PRIVACY ONLINE

An Internet service provider can control its customers' use of the Internet to communicate or to track what users do and say online. Where citizens have a choice of ISPs, users who like filtering or other content restrictions can flock to an ISP that content discriminates, while those who do not like it have other choices. But when a single provider can force customers to choose a particular ISP, the ISP can burden free speech and privacy without fear of losing customers. Metaphorically, if the cable pipeline is a road, and the ISPs are the companies that own the trucks that drive on the road, then Internet communications are the packages that users send in the trucks. If there's only one trucking company to choose from, and those trucks refuse to carry a particular package of communications, then those senders, Internet speakers, have no speech alternatives. They cannot protect their interests by switching providers.

This Court recognized the fundamental importance of public access to a variety of communications unfettered by the owner of a particular communications pathway in *Turner Broadcasting*. As this Court observed about cable television: "simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch." 512 U.S. at 656. Impelled by the danger of private censorship, and noting that, "[t]he First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas," *id.* at 657, this Court deemed "must-carry" regulations requiring cable operators to carry local broadcast channels to be content-neutral. *Id.* at 661-62. The present questions about cable Internet access share many of the same contours as those resolved by the Court in *Turner Broadcasting*.[4]

The Internet is a tremendous wellspring of democratic speech, a facility that, "provides an opportunity for those with access to it to communicate with a worldwide audience at little cost." *American Library Ass'n, Inc. v. United States*, 201 F. Supp. 2d 401, 416 (E.D. Pa. 2002) *rev. on other gr.* 539 US 198 (2003). It is irreplaceable as a facilitator of free expression; no other medium gives speakers the same power to reach so much of the world so cheaply and easily. No alternative channel of communication accessible to ordinary citizens comes close. As

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[4] While monopoly control over content is a similar concern in both cable television and cable broadband Internet, the two services are distinct as a matter of statutory definition. Cable television is a "cable service," sending a "one-way transmission to subscribers of video programmming or other programming service" and receiving only that "subscriber interaction...required for the selection or use of such video programming...." 47 U.S.C. § 522 (2000). Cable broadband, as argued above, is a two-way "telecommunications service." Mandated common carrier access for broadband would affect only those parts of the cable line that provide telecommunications. It would not change the regulatory framework for cable TV.

more users go online and more discourse shifts to the network, potential restrictions on online speech pose an ever greater threat of injury to that discourse. The need to protect Internet users from systemic regulations that threaten to chill or hinder their speech grows with every increase in network usage.

Cable ISPs can enjoy far more fine-grained power to both control and observe users' communications to a far greater extent than cable television providers could. They have this power as a result of sitting on a choke point on the network; since the ISP provides access and passes information from its users to the Internet at large, every message users send and receive must pass through it. *See CTC Analysis* at 18-19. Those messages are processed on an individualized basis by the ISP's computers, not broadcast to many or all subscribers like the video images carried over cable television. The ISP can program its computers to do whatever it wishes with messages to or from subscribers. Generally, the programming directs that the messages be routed to their destinations without delay. There is, however, no technical requirement that all messages be treated in this way; what can be done with the users' messages is limited only by what a computer can be programmed to do. Since a computer can be programmed to do nearly anything with information, there are virtually no limits to ISPs' power in this arena. They can set up their systems to block messages, prioritize some over others, or record them for later inspection. *Id.* at 19-20.

For example, cable ISPs might seek to inspect the content of users' communications in ways that violate privacy. An ISP might keep records of what Web pages its customers have visited. At least one cable ISP, Comcast, has already done so. Stefanie Olsen and Rachel Konrad, *Comcast Privacy Move its Latest Woe*, CNET News.com (2002), *at* http://news.com.com/2100-1023-836937.html. The company could then sell this tracking information to marketers who wish to target advertising to consumers with particular interests, bringing more unwanted commercial email ("spam") into users' inboxes and increasing the risk that their personal information might leak to identity thieves. Customers who did not wish to disclose their surfing habits would have no other practical option.

Even more invasive measures are possible; ISPs might scan through their customers' electronic mail messages for information about their online purchases. One electronic mail provider has been caught doing just that, as part of a scheme to benefit its affiliated bookselling business by tracking customers' communications with Amazon.com. *See United States v. Councilman*, 373 F.3d 197 (1st Cir. 2004), *vacated by* 385 F.3d 793 (1st Cir. 2004). The extent to which ISPs can pry into their customers' online communications is nearly unlimited.

To control the way citizens use the Internet to communicate, cable ISPs can configure their services to delete or slow selected information based on source, destination, or even subject matter or viewpoint, as the ISP desires. *CTC Supplement* at 49-50. Technology to enable this sort of discrimination is actively marketed to ISPs. Cisco, the leading manufacturer of Internet routing equipment, advertises that its products can be used "to prevent outside content providers from disrupting the cable network by delivering broadband content without authorization." Cisco Systems, *Controlling Your Network – A Must for Cable Operators* (1999), *available at* http://www.cptech.org/ecom/openaccess/cisco1.html (last visited Feb. 7, 2005).

Cable companies also can profit from setting up their networks to favor information from affiliated content providers. They can reserve capacity on their telecommunications lines as a "fast lane" for data from preferred sources, and offer preferential treatment only to those who have paid for the privilege or who are part of the same umbrella corporation. *CTC Analysis* at 20. For instance, Time Warner could choose to speed access to CNN's website and slow access to other news sources. An ISP could take payment from a music distribution service like Napster to ensure that its downloads go faster than those of songs provided by Apple's iTunes. To subscribers, the discrimination would be perceived only as data arriving faster or slower. They would not be able to distinguish it from normal variances in network congestion: "[a] cable Internet customer has no way of knowing if and how traffic flow management is being used and what policies cable system administrators are setting." *CTC Supplement at 53.* Yet, the discrimination would be there nonetheless, steering

subscribers to certain areas of the Internet, and away from others without their knowledge. In an era of increasing media consolidation, content discrimination can be good business.

Additionally, cable providers may use their market power to stop their customers from making certain uses of the Internet. For instance, an ISP that also operated a traditional telephone or mobile phone service could block its customers' access to companies like Vonage, which sell economical Internet-based telephone applications. *Id.* at 49. The ISP could not only block Internet telephony applications, but also Vonage's marketing messages or webpage from traveling over its pipeline. Customers may literally never know what they are missing. This is not mere speculation. Vonage already alleges that some DSL providers – ones owned by incumbent phone companies with which it competes – are discriminating against it. *See* Paul Kapustka, *Vonage Complaining of VoIP 'Blocking,'* Advanced IP Pipeline (Feb. 14, 2005), *available at* http://advancedippipeline.com /60400413 (last visited Feb. 15, 2005). Along the same lines, ISPs might choose to block customers from viewing streaming video online in order to steer them to watch the cable company's television offerings instead.

Cable companies might also selectively block applications as part of a price-discrimination scheme. For instance, business users could be forced to pay more for the right to use virtual private network (VPN) software to securely access their office network, or users who wished to operate their own Web server might be charged a premium. *CTC Analysis* at 19-20. Customers unwilling to pay the additional price might find themselves unable to protect their privacy using a VPN or speak using their own Web outlet. Those willing to pay would be charged monopoly rates. *See* Bob Brewin, *Telecommuters Must Pay Extra for Cable VPNs*, Computerworld (Dec. 13, 2001), *available at* http://www.computerworld.com/managementtopics/outsourcing/isptelecom/story/0,10801,66589,00.html (last visited Feb. 14, 2005).

There is no practical limit to the way that broadband providers with market dominance can impact speech on the Internet. A dominant cable ISP could discriminate against certain communications simply because they present an alternative

political viewpoint or criticizes the cable company's business practices. An ISP controlled by a politically-inclined CEO or board could use the network to promote political positions supporting its candidates or issues. It could block or slow access to the websites of rival candidates, or redirect users to the preferred candidate's site. It could delete emails from rival political parties before they reach customer mailboxes. It could block or slow access to news articles critical of the company.

When a newspaper engages in this sort of political discrimination, it is protected editorializing, and citizens have the ability to seek out alternative viewpoints. But when customers do not have a meaningful choice of Internet access provider, the ISP can, for entirely understandable business reasons, pose a real and acute threat to free speech interests. Without real ISP choice, customers have no economic leverage or choice in favor of speech. If a private entity can undermine the exercise of free expression, the Internet may cease to be a place where, as this Court recognized in *Reno v. ACLU*, any user can, "become a town crier with a voice that resonates farther than it could from any soapbox." 521 U.S. 844, 870 (1997). In *Reno*, the Court protected the Internet from state censorship by holding that the First Amendment applied to this novel and unprecedented engine for free speech. Here, the threat to speech comes from this FCC decision to entitle private entities to wield their market power to restrain customer choice and speech, if they so wish.

Congress has acted upon this concern; it recognized the promise of communications lines for facilitating free speech, as well as the threat of monopoly control, when it enacted the Telecommunications Act. Regulating the broadband pipeline as a telecommunications service would mitigate these dangers by enabling Internet users to have a choice of ISPs. Citizens then have the option of selecting ISP services that accord with the way they want to communicate on the Internet. That recognition was part of the reason for the FCC's statutory mandate to consider the public interest carefully before forbearing from telecommunications service regulations.

The Internet became the engine for speech this Court recognized in *Reno v. ACLU* thanks to the FCC policy that

prevented network owners from discrimination, giving rise to the wide availability of many competing ISPs, all of which exercise their own free speech rights in concert with their customers'. In an open-access non-discriminatory environment, each ISP – including the one owned by the cable company or other telecommunications provider – retains the ability to select what content it will send over the telecommunications lines. Consumers also retain the power of choice, and those that wish to speak and listen without restriction can choose an ISP that will make their speech activities possible. The public interest in this kind of competition-fueled free speech market is as strong if not stronger over broadband Internet as it was over narrowband. To protect this fundamental public interest, the FCC must first facilitate ISP competition over the cable lines by properly classifying broadband pipes as telecommunications services.

CONCLUSION

For the reasons stated, the judgment below should be affirmed.

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